(1) Supreme Court, U.S.
FILED
041182 MAR 4 - 2005
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

IN RE COOPER INDUSTRIES, INC., *Petitioner,*

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

DALE E. STEPHENSON
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

WM. BRADFORD REYNOLDS
Counsel of Record
LISA K. HSIAO
HOWREY, SIMON, ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner Cooper Industries, Inc.

QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals contravene this Court's mandate when, without the benefit of any substantive briefing or argument, it issued a remand order to "permit Aviall Services to amend its complaint…free of any challenge of waiver or forfeiture" despite this Court's express determination that the "preliminary waiver question" should, on remand from this Court, receive "full consideration by the courts below?"

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

Hon. Carolyn D. King, Judge
United States Court of Appeals for the Fifth Circuit

Hon. E. Grady Jolly, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Patrick E. Higginbotham, Judge
United States Court of Appeals for the Fifth Circuit

Hon. W. Eugene Davis, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Edith H. Jones, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Jerry E. Smith, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Jacques L. Wiener, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Rhesa H. Barksdale, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Emilio M. Garza, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Harold R. Demoss, Jr., Judge
United States Court of Appeals for the Fifth Circuit

Hon. Fortunato P. Benavides, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Carl E. Stewart, Judge
United States Court of Appeals for the Fifth Circuit

Hon. James L. Dennis, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Edward C. Prado, Judge
United States Court of Appeals for the Fifth Circuit

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. merged into Cooper Industries, LLC, which is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE FIFTH CIRCUIT'S ORDER DIRECTLY CONTRADICTS THIS COURT'S MANDATE 5

II. MANDAMUS IS NECESSARY AND PROPER TO RECONCILE THE FIFTH CIRCUIT'S ORDER WITH THE MANDATE OF THIS COURT 7

III. COOPER HAS NO OTHER MEANS OF ADEQUATE RELIEF 8

CONCLUSION 10

INDEX TO APPENDIX

Cooper Industries, Inc. v. Aviall Services, Inc., No. 02-1192 (Dec. 13, 2004) (Supreme Court opinion) 1a

Motion for Leave to File Supplemental Briefs by Aviall Services, Inc. (Jan. 12, 2005) 19a

Response Brief of Cooper Industries, Inc. in Opposition to Aviall Services, Inc.'s Motion for Leave to File Supplemental Briefs (Jan. 25 2005) 22a

Reply Brief of Aviall Services, Inc. in Support of Request for Supplemental Briefing (Jan. 29, 2005) 30a

Aviall Services, Inc. v. Cooper Industries, Inc., No. 00-10197 (5th Cir. Feb. 15, 2005) (remand order) 35a

TABLE OF AUTHORITIES

CASES

Aviall Services v. Cooper Industries,
312 F.3d 677 (5th Cir. 2002) 2-3

Aviall Services v. Cooper Industries,
263 F.3d 134 (5th Cir. 2001) 2

Baltimore & O. R. Co. v. United States,
279 U.S. 781 (1929) 7

Bucolo v. Adkins,
424 U.S. 641 (1976) 7

City Bank v. Hunter,
152 U.S. 512 (1894) 7

Connor v. Coleman,
440 U.S. 612 (1979) 7

Deen v. Hickman,
358 U.S. 57 (1958) 7

Delaware, L & W R. Co. v. Rellstab,
276 U.S. 1 (1928) 8

General Atomic Co. v. Felter,
436 U.S. 493 (1978) 7, 9

Perkins v. Fourniquet,
55 U.S. 328 (1853) 8

In re Potts,
166 U.S. 263 (1897) 9

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 7

United States v. Fossatt,
62 U.S. 445 (syllabus) (1859) 7-8

United States v. Haley,
371 U.S. 18 (1962) 7

United States v. United States Dist. Ct. for the Southern Dist. of N.Y., 334 U.S. 258 (1948) 8

Vendo Co. v. Lektro-Vend Corp.,
434 U.S. 425 (1978) 7

Vetterli v. United States Dist. Court for Cent. Dist.,
435 U.S. 1304 (1978) 7

In re Washington & Georgetown Railroad,
140 U.S. 91 (1891) 7

STATUTES

28 U.S.C. § 1651(a) 1, 2

42 U.S.C. § 9607(a) ..... *passim*

42 U.S.C. § 9613(f)(1) 2

No. _____

In the Supreme Court of the United States

IN RE COOPER INDUSTRIES, INC., *Petitioner,*

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

Petitioner Cooper Industries, Inc. respectfully petitions for issuance of a writ of mandamus requiring the Fifth Circuit Court of Appeals to conform its actions to this Court's December 13, 2004 mandate.

OPINIONS BELOW

The remand order of the *en banc* Fifth Circuit at issue here is not reported and appears in the Appendix ("App.") at 35a. This Court's December 13, 2004 opinion and mandate appear at App. 1a.

JURISDICTION

Jurisdiction to issue the requested writ of mandamus directing the conduct of the Fifth Circuit Court of Appeals exists pursuant to 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The statutory basis alleged for the underlying claim with respect to which a waiver question is presented is Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 107(a).

STATEMENT OF THE CASE

In 1997, Aviall Services, Inc. ("Aviall") sued Petitioner Cooper Industries, Inc. ("Cooper") in the United States District Court for the Northern District of Texas seeking environmental costs associated with contamination at four of its properties. App. 5a. Aviall initially brought a claim for direct cost recovery against Cooper under CERCLA Section 107(a), 42 U.S.C. § 9607(a), and for contribution under Section 113(f)(1), 42 U.S.C. § 9613(f)(1). *Id.* Aviall subsequently chose to amend its complaint to delete Count I containing its Section 107(a) cost-recovery claim. *Id.* On Cooper's motion for summary judgment, the District Court determined that Aviall's Section 113(f)(1) contribution claim lacked the necessary legal prerequisites to survive. App. 6a. On August 14, 2001, a divided panel of the Fifth Circuit affirmed. *Aviall Services v. Cooper Industries*, 263 F.3d 134 (5th Cir. 2001). On rehearing, a majority of the Fifth Circuit, sitting *en banc*, reversed, holding that a "PRP may sue at any time for contribution..." under Section 113(f)(1). *Aviall Services v. Cooper*

Industries, 312 F.3d 677, 681 (5th Cir. 2002). This Court granted certiorari, and, following briefing and argument, determined that "Section 113(f)(1) does not authorize Aviall's suit." App. 7a.

In its merits brief to the Court, Aviall urged that, if this Court foreclosed its Section 113(f)(1) claim, it should remand the issue of whether Aviall may seek direct cost recovery under Section 107(a) for further consideration. One of the *amicus* briefs filed in support of Aviall went further, and urged this Court to directly determine whether Aviall was entitled to pursue cost recovery under Section 107(a). The Court's majority addressed this issue expressly:

> Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's § 107 claim. Aviall included separate § 107 and § 113 claims in its original complaint, but then asserted a "combined" § 107/ § 113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on § 107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim." Consequently the court saw no need to address any freestanding § 107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a standalone § 107 claim. The en banc court found it unnecessary to decide whether Aviall had waived the § 107 claim, because it held that Aviall could rely instead on § 113. Thus, the court did not address the waiver issue, let alone the merits of the § 107 claim.

App. 10a (internal citations omitted).

While declining to address the Section 107(a) issue, the Court's opinion framed two questions for consideration on remand, specifically concluding that "[t]he Section 107 claim *and the preliminary waiver question* merit full consideration by the courts below." App. 11a (emphasis added). Using customary language, it reversed the *en banc* Fifth Circuit's decision and "remand[ed] the case for further proceedings consistent with this opinion." App. 13a.

On January 13, 2005, Aviall moved the Fifth Circuit for permission to brief and present argument directly to the *en banc* court on "whether Aviall may pursue its section 107 claim," so as to have the issue decided in the first instance by the full Fifth Circuit. App. 19a. Cooper opposed this motion, arguing that the "preliminary waiver question," specifically identified by this Court as deserving "full consideration by the courts below," App. 11a, was innately factual and should be remanded to the fact-finding court in the first instance. App. 22a. Cooper further pointed out that Aviall's waiver of any potential direct cost-recovery claim under Section 107(a) is demonstrated in several distinct contexts: "through abandonment of that cause of action in its pleadings, failure to prosecute the claim, direct representations or admissions to the District Court, [and] failure to appeal the District Court's previous determination regarding abandonment of the direct § 107 claim...." App. 23a (footnote omitted).

The Fifth Circuit denied Aviall's motion, and remanded the case to the District Court. However, it did so in a manner that prematurely decided the waiver issue without the aid of briefing or argument, and foreclosed any consideration of it whatsoever by the District Court.

Specifically, the Fifth Circuit's February 15, 2005 remand order provided:

> [T]he case is **REMANDED** to the district court *with instructions* to permit Aviall Services to amend its complaint, if necessary, to assert, *free of any challenge of waiver or forfeiture, whatever statutory claims it urges* in light of the Supreme Court's decision, without prejudice to Cooper Industries' other defenses.

App. 36a (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S ORDER DIRECTLY CONTRADICTS THIS COURT'S MANDATE

This Court's preliminary analysis of any potential rights Aviall might have under Section 107 identified two key issues for further consideration on remand: (1) the "preliminary waiver question" of "whether Aviall has waived this claim" and (2) "the underlying § 107 question (if it is not waived)...." App. 10a-11a. Because these issues were "well beyond the scope of the briefing and, indeed, the question presented" before this Court, App. 10a, the majority declined to resolve either, despite the urgings of the dissent. *Id.* Rather, this Court specified how and by whom these issues should be carefully evaluated and ultimately resolved, ruling that "[t]he § 107 claim and the preliminary waiver question merit *full consideration by the courts below*." App. 11a (emphasis added). This Court then "remand[ed] the case for further proceedings consistent with this opinion." The import of this mandate is clear: the Fifth Circuit and the District Court were to *fully consider* first the "preliminary

waiver question" and then, if necessary, the potential viability of any remaining direct cost-recovery claim under Section 107(a).

The Fifth Circuit's remand order does not adhere to this Court's mandate. Instead, by directing the trial court to permit Aviall to assert, through an amended complaint, a Section 107(a) claim for cost recovery against Cooper, "*free of any challenge of waiver or forfeiture*...," App. 36a (emphasis added), the Fifth Circuit has ensured that the "preliminary waiver issue," which this Court specifically identified as deserving "full consideration by the courts below" (*id.*), will receive no meaningful, substantive consideration whatsoever.

The Fifth Circuit's preemptive remand order was entered without benefit of briefing and argument on the "waiver" issue. Indeed, as this Court recognized, the record before the appeals court, which is entirely devoid of the factual development that this Court's remand order contemplates,[1] is insufficient to resolve the issue.[2] Thus,

---

[1] The insufficiency of the factual record before the Fifth Circuit was referenced in Cooper's opposition to Aviall's Motion for Leave to File Supplemental Briefs. *See, e.g.*, App. 27a ("A detailed assessment of this factual issue [of waiver] may necessarily involve fact gathering, including discovery regarding the circumstances surrounding Aviall's change in position and testimony from each person involved.... Following such an inquiry, Judge Fitzwater will be uniquely positioned to decide this factual issue based on his historic personal interaction with counsel, the testimony and demeanor of other witnesses and the nature of the arguments made.").

[2] *See* App. 10a ("Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113. That relationship is a significant issue of its own right. It is also well beyond the scope of briefing....").

while Cooper's "other defenses" were preserved "without prejudice" to asserting them in the District Court, App. 36a, the defenses of "waiver or forfeiture" have been summarily foreclosed on a barren factual record and without "full consideration" of the issue by any court. This Court directed that the "preliminary waiver question" receive far more fulsome consideration by the courts below. A writ of mandamus is required to enforce that mandate.

II. MANDAMUS IS NECESSARY AND PROPER TO RECONCILE THE FIFTH CIRCUIT'S ORDER WITH THE MANDATE OF THIS COURT

This Court has repeatedly recognized that the failure of a lower court to give effect to a Supreme Court mandate creates a proper context for mandamus. *See, e.g., Connor v. Coleman*, 440 U.S. 612, 628-29 (1979) ("When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court...by writ of mandamus. It is well understood that this court has power to do all that is necessary to give effect to its judgments.") (*citing Baltimore & O. R. Co. v. United States*, 279 U.S. 781, 786 (1929)); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (if a lower court "mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled...by a writ of mandamus to execute the mandate of this Court") (*citing Vetterli v. United States Dist. Court for Cent. Dist.*, 435 U.S. 1304 (1978) and *quoting In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).[3] Thus the use of mandamus here,

---

[3] *See also Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 429 (1978); *Bucolo v. Adkins*, 424 U.S. 641, 643-644 (1976); *United States v. Haley*, 371 U.S. 18, 19 (1962); *Deen v. Hickman*, 358 U.S. 57 (1958); *City Bank v. Hunter*, 152 U.S. 512, 514-515 (1894); *In re Washington & Georgetown Railroad*, 140 U.S. 91, 95-96 (1891); *United States v.*

where the Fifth Circuit has strayed far from the path set for it, is well supported.

Exercise of this Court's mandamus power is also fully consistent with the parameters of S. Ct. Rule 20.1. There can be nothing more directly necessary to "aid...the Court's appellate jurisdiction" than ensuring that its mandates are duly regarded and properly construed. In the words of this Court, "issuance of mandamus requiring the lower court to enforce the judgment of the appellate court" is needed to "protect[] the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review...." *United States v. United States Dist. Ct. for the Southern Dist. of N.Y.*, 334 U.S. 258, 263 (1948) (internal citations omitted). Thus, appellate remand orders that, as here, operate to impede or prevent compliance with a Supreme Court mandate pose precisely the type of exceptional circumstance that justifies mandamus. *See id.* at 264 ("It is, indeed, a high function of mandamus to keep a lower court tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court.") (citing *Delaware, L & W R. Co. v. Rellstab*, 276 U.S. 1, 5 (1928)).

III. COOPER HAS NO OTHER MEANS OF ADEQUATE RELIEF

Without this Court's intervention, this eight-year-old case will begin anew before the District Court with the filing of a new complaint containing "whatever statutory claims" Aviall decides to assert. Cooper will have been stripped of all ability to make a factual showing and legal argument of

---

Fossatt, 62 U.S. 445, 446 (syllabus) (1859); and *Perkins v. Fourniquet*, 55 U.S. 328, 330 (1853).

waiver.[4] Cooper's only conceivable recourse would be to fully litigate Aviall's new complaint, appeal the inability to argue waiver to the Fifth Circuit, and then finally petition this Court for certiorari regarding the availability of the defense of waiver. This is not an "adequate means of relief." Rather, litigants who have "obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Felter*, 436 U.S. at 497.

This Court unequivocally ordered the courts below to give "full consideration" to "the question whether Aviall has waived [a free-standing Section 107(a)] claim." App. 10a. The Fifth Circuit was thus obliged to carry this clear mandate to execution. It was not at liberty to "vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error...or intermeddle with it further than to settle so much as has been remanded." *In re Potts*, 166 U.S. 263, 265 (1897). Nonetheless, the Fifth Circuit summarily ordered that Aviall be permitted to pursue a Section 107(a) claim on remand to the trial court "free of any challenge of waiver or forfeiture." App. 36a. Because this directive squarely contradicts this Court's remand order instructing "full consideration by the courts below" of the waiver issue, the requested writ of mandamus is required.

---

[4] As previously explained, Cooper maintains that Aviall has waived its claim in three ways: (1) by amendment of its complaint to drop its Section 107 cost-recovery claim, (2) through confirmation of this waiver as conceded to the District Court during oral argument, and (3) by failure to raise the issue on appeal. *See* App. 22a – 29a generally.

CONCLUSION

Cooper Industries, Inc. respectfully requests the issuance of a writ of mandamus to the United States Court of Appeals for the Fifth Circuit directing that its remand of this case to the District Court for the Northern District of Texas allow "full consideration" by the trial court of: (1) whether Aviall Services, Inc. has waived its right to assert a direct cost-recovery claim under Section 107(a) of CERCLA, as well as (2) whether, if no waiver is found, Aviall may otherwise pursue such a claim under Section 107(a) of CERCLA.

Respectfully submitted,

DALE E. STEPHENSON
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

WM. BRADFORD REYNOLDS
LISA K. HSIAO
HOWREY, SIMON, ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner Cooper Industries, Inc.

MARCH 2005

SUPREME COURT OF THE UNITED STATES

No. 02-1192

COOPER INDUSTRIES, INC., PETITIONER *v.* AVIALL SERVICES, INC.

543 U. S. ____ (2004)

October 6, 2004, Argued
December 13, 2004, Decided

JUSTICE THOMAS delivered the opinion of the Court.

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[5] allows persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties liable under CERCLA. Section 113(f)(1) specifies that a party may obtain contribution "during or following any civil action" under CERCLA § 106 or § 107(a). The issue we must decide is whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not.

---

[5] Section 113(f)(1) is codified at 42 U.S.C. § 9613(f)(1). We refer throughout, for the most part, to sections of CERCLA rather than the U.S. Code.

I

Under CERCLA, 94 Stat. 2767, the Federal Government may clean up a contaminated area itself, see § 104, or it may compel responsible parties to perform the cleanup, see § 106(a). See *Key Tronic Corp.* v. *United States,* 511 U.S. 809, 814, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994). In either case, the Government may recover its response costs under § 107, 42 U.S.C. § 9607 (2000 ed. and Supp. I), the "cost recovery" section of CERCLA. Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they "shall be liable" for, among other things, "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." § 107(a)(4)(A).[6] Section 107(a) further provides that PRPs shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." § 107(a)(4)(B).

After CERCLA's enactment in 1980, litigation arose over whether § 107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs to recover costs from other PRPs. More specifically, the question was whether a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) and its predecessors authorized such a cause of action. See, *e.g., Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 890-892 (CA9 1986); *Walls* v. *Waste Resource Corp.*, 761 F.2d 311,

---

[6] The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA) pursuant to CERCLA § 105, 42 U.S.C. § 9605 (2000 ed. and Supp. I). The plan is codified at 40 CFR pt. 300 (2004).

317-318 (CA6 1985); *Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135, 1140-1143 (ED Pa. 1982).

After CERCLA's passage, litigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs. As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of action for contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word "contribution," such a right arose either impliedly from provisions of the statute, or as a matter of federal common law. See, *e.g.*, *United States* v. *New Castle County*, 642 F. Supp. 1258, 1263-1269 (Del. 1986) (contribution right arises under federal common law); *Colorado* v. *ASARCO, Inc.*, 608 F. Supp. 1484, 1486-1493 (Colo. 1985) (same); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (ED Mo. 1985) (contribution right is implied from § 107(e)(2)). That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-647, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981) (refusing to recognize implied or common-law right to contribution in the Sherman Act or the Clayton Act); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-99, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981) (refusing to recognize implied or common-law right to contribution in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

Congress subsequently amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, to provide an express cause of action for contribution, codified as CERCLA § 113(f)(1):

> "Any person may seek contribution from any other person who is liable or potentially liable

> under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." *Id.*, at 1647, as codified in 42 U.S.C. § 9613(f)(1).

SARA also created a separate express right of contribution, § 113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B).[7]

---

[7] In *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994), we observed that § 107 and § 113 created "similar and somewhat overlapping" remedies. *Id.*, 511 U.S. at 816, 128 L. Ed. 2d 797, 114 S. Ct. 1960. The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.

II

This case concerns four contaminated aircraft engine maintenance sites in Texas. Cooper Industries, Inc., owned and operated those sites until 1981, when it sold them to Aviall Services, Inc. Aviall operated the four sites for a number of years. Ultimately, Aviall discovered that both it and Cooper had contaminated the facilities when petroleum and other hazardous substances leaked into the ground and ground water through underground storage tanks and spills.

Aviall notified the Texas Natural Resource Conservation Commission (Commission) of the contamination. The Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Neither the Commission nor the EPA, however, took judicial or administrative measures to compel cleanup.

Aviall cleaned up the properties under the State's supervision, beginning in 1984. Aviall sold the properties to a third party in 1995 and 1996, but remains contractually responsible for the cleanup. Aviall has incurred approximately $ 5 million in cleanup costs; the total costs may be even greater. In August 1997, Aviall filed this action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover cleanup costs. The original complaint asserted a claim for cost recovery under CERCLA § 107(a), a separate claim for contribution under CERCLA § 113(f)(1), and state-law claims. Aviall later amended the complaint, combining its two CERCLA claims into a single, joint CERCLA claim. That claim alleged that, pursuant to § 113(f)(1), Aviall was entitled to seek contribution from Cooper, as a PRP under § 107(a), for response costs and other liability Aviall incurred in

connection with the Texas facilities.[8] Aviall continued to assert state-law claims as well.

Both parties moved for summary judgment, and the District Court granted Cooper's motion. The court held that Aviall, having abandoned its § 107 claim, sought contribution only under § 113(f)(1). The court held that § 113(f)(1) relief was unavailable to Aviall because it had not been sued under CERCLA § 106 or § 107. Having dismissed Aviall's federal claim, the court declined to exercise jurisdiction over the state-law claims.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 263 F.3d 134 (2001). The majority, relying principally on the "during or following" language in the first sentence of § 113(f)(1), held that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Id.*, at 145. The dissent reasoned that the final sentence of § 113(f)(1), the saving clause, clarified that the federal common-law right to contribution survived the enactment of § 113(f)(1), even absent a § 106 or § 107(a) civil action. *Id.*, at 148-150 (opinion of Wiener, J.).

On rehearing en banc, the Fifth Circuit reversed by a divided vote, holding that § 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under § 106 or § 107. 312 F.3d 677 (2002). The court held that "[s]ection 113(f)(1) authorizes suits

---

[8] Aviall asserts that it framed its claim in the manner compelled by Fifth Circuit precedent holding that a § 113 claim is a type of § 107 claim. *Geraghty & Miller, Inc.* v. *Conoco, Inc.*, 234 F.3d 917, 924 (CA5 2000); see also, *e.g.*, *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-353 (CA6 1998); *Sun Co., Inc.* v. *Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (CA10 1997); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1302 (CA9 1997).

against PRPs in both its first and last sentence[,] which states without qualification that 'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action." *Id.*, at 681. The court reasoned in part that "may" in § 113(f)(1) did not mean "may only." *Id.*, at 686-687. Three members of the en banc court dissented for essentially the reasons given by the panel majority. *Id.*, at 691-693 (opinion of Garza, J.). We granted certiorari, 540 U.S. 1099, 540 U.S. 1099, 157 L. Ed. 2d 811, 124 S. Ct. 981, and now reverse.

III

A

Section 113(f)(1) does not authorize Aviall's suit. The first sentence, the enabling clause that establishes the right of contribution, provides: "Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title," 42 U.S.C. § 9613 (f)(1) (emphasis added). The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action.

Aviall answers that "may" should be read permissively, such that "during or following" a civil action is one, but not the exclusive, instance in which a person may seek contribution. We disagree. First, as just noted, the natural meaning of "may" in the context of the enabling clause is that it authorizes certain contribution actions -- ones that satisfy the subsequent specified condition -- and no others.

Second, and relatedly, if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to

do. See, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. ___, ___ , 540 U.S. 1099, 157 L. Ed. 2d 811, 124 S. Ct. 982 (2004) (slip op., at 10). Likewise, if § 113(f)(1) authorizes contribution actions at any time, § 113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.

The last sentence of § 113(f)(1), the saving clause, does not change our conclusion. That sentence provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1). The sole function of the sentence is to clarify that § 113(f)(1) does nothing to "diminish" any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1). Reading the saving clause to authorize § 113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 35-36, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1992).

Our conclusion follows not simply from § 113(f)(1) itself, but also from the whole of § 113. As noted above,

§ 113 provides two express avenues for contribution: § 113(f)(1) ("during or following" specified civil actions) and § 113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State). Section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, § 113(g)(3)(A), and one beginning at the date of settlement, § 113(g)(3)(B). Notably absent from § 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup. The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).

Each side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: "It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998). Section 113(f)(1), 100 Stat. 1647, authorizes contribution claims only "during or following" a civil action under § 106 or § 107(a), and it is undisputed that Aviall has never been subject to such an action.[9] Aviall therefore has no § 113(f)(1) claim.

B

Aviall and *amicus* Lockheed Martin contend that, in the alternative to an action for contribution under § 113(f)(1),

---

[9] Neither has Aviall been subject to an administrative order under § 106; thus, we need not decide whether such an order would qualify as a "civil action under section 9606 . . . or under section 9607(a)" of CERCLA. 42 U.S.C. § 9613(f)(1).

Aviall may recover costs under § 107(a)(4)(B) even though it is a PRP. The dissent would have us so hold. We decline to address the issue. Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's § 107 claim. In fact, as noted above, Aviall included separate § 107 and § 113 claims in its original complaint, but then asserted a "combined" § 107/ § 113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on § 107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim." Civ. Action No. 3:97-CV-1926-D (ND Tex., Jan. 13, 2000), App. to Pet. for Cert. 94a, n. 2. Consequently the court saw no need to address any freestanding § 107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a standalone § 107 claim. 263 F.3d at 137, n. 2. The en banc court found it unnecessary to decide whether Aviall had waived the § 107 claim, because it held that Aviall could rely instead on § 113. 312 F.3d at 685, n. 15. Thus, the court did not address the waiver issue, let alone the merits of the § 107 claim.

"We ordinarily do not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta,* 534 U.S. 103, 109, 151 L. Ed. 2d 489, 122 S. Ct. 511 (2001) *(per curiam)* (internal quotation marks omitted). Although we have deviated from this rule in exceptional circumstances, *United States* v. *Mendenhall,* 446 U.S. 544, 551-552, n. 5, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980), the circumstances here cut *against* resolving the § 107 claim. Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113. That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an

action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The § 107 claim and the preliminary waiver question merit full consideration by the courts below.

Furthermore, the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability. See, *e.g., Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-424 (CA2 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-356 (CA6 1998); *Pneumo Abex Corp.* v. *High Point, T. & D. R. Co.*, 142 F.3d 769, 776 (CA4 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (CA9 1997); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1120-1124 (CA3 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496, and n. 7 (CA11 1996); *United States* v. *Colorado & E. R. Co.*, 50 F.3d 1530, 1534-1536 (CA10 1995); *United Technologies Corp.* v. *Browning-Ferris Industries*, 33 F.3d 96, 98-103 (CA1 1994). To hold here that Aviall may pursue a § 107 action, we would have to consider whether these decisions are correct, an issue that Aviall has flagged but not briefed. And we might have to consider other issues, also not briefed, such as whether Aviall, which seeks to recover the share of its cleanup costs fairly chargeable to Cooper, may pursue a § 107 cost recovery action for some form of liability other than joint and several. We think it more prudent to withhold judgment on these matters.

In view of the importance of the § 107 issue and the absence of briefing and decisions by the courts below, we are not prepared -- as the dissent would have it -- to resolve the § 107 question solely on the basis of dictum in *Key Tronic*. We held there that certain attorney's fees were not "necessary costs of response" within the meaning of § 107(a)(4)(B). 511 U.S., at 818-821, 128 L. Ed. 2d 797, 114 S. Ct. 1960. But we

did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§ 107 and 113. In discussing § 107, we did not even classify it precisely as a right of cost recovery or a right of contribution, as the dissent's descriptions of the decision reveal. *Post*, at 1-2 (opinion of GINSBURG, J.) (describing *Key Tronic* as recognizing a right to "'seek recovery of cleanup costs'" (quoting 511 U.S., at 818, 128 L. Ed. 2d 797, 114 S. Ct. 1960), but in the following paragraph saying that *Key Tronic* identified a "right to contribution"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511, 69 L. Ed. 411, 45 S. Ct. 148 (1925). Aviall itself recognizes the need for fuller examination of the § 107 claim; it has simply requested that we remand for consideration of that claim, not that we resolve the claim in the first instance.

C

In addition to leaving open whether Aviall may seek cost recovery under § 107, Part III-B, *supra*, we decline to decide whether Aviall has an implied right to contribution under § 107. Portions of the Fifth Circuit's opinion below might be taken to endorse the latter cause of action, 312 F.3d at 687; others appear to reserve the question whether such a cause of action exists, *id.*, at 685, n. 15. To the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery),[10] we note that this Court has visited the subject of implied rights of contribution before. See *Texas Industries*, 451 U.S., at 638-647, 68 L. Ed. 2d 500, 101 S. Ct. 2061;

---

[10] As noted above, we do not address whether a § 107 cost recovery action by Aviall (if not waived) may seek some form of liability other than joint and several.

Northwest Airlines, 451 U.S., at 90-99, 67 L. Ed. 2d 750, 101 S. Ct. 1571. We also note that, in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979). Nonetheless, we need not and do not decide today whether any judicially implied right of contribution survived the passage of SARA.

* * *

We hold only that § 113(f)(1) does not support Aviall's suit. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 02-1192

COOPER INDUSTRIES, INC., PETITIONER *v.* AVIALL SERVICES, INC.

543 U. S. ____ (2004)

October 6, 2004, Argued
December 13, 2004, Decided

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Aviall Services, Inc., purchased from Cooper Industries, Inc., property that was contaminated with hazardous substances. Shortly after the purchase, the Texas Natural Resource Conservation Commission notified Aviall that it would institute enforcement action if Aviall failed to remediate the property. Aviall promptly cleaned up the site and now seeks reimbursement from Cooper. In my view, the Court unnecessarily defers decision on Aviall's entitlement to recover cleanup costs from Cooper.

In *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994), all Members of this Court agreed that § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607, "unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs." The Court rested that determination squarely and solely on

§ 107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.[11]

The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in § 107(a)'s text, as the majority determined, or whether § 107(a) expressly confers the right, as the dissenters urged. The majority stated: Section 107 "*implies* -- but does not expressly *command* -- that [a PRP] may have a claim for contribution against those treated as joint tortfeasors." 511 U.S., at 818, 128 L. Ed. 2d 797, 114 S. Ct. 1960, and n. 11 ((emphasis added)). The dissent maintained: "Section 107(a)(4)(B) states, as clearly as can be, that 'covered persons . . . shall be liable for . . . necessary costs of response incurred by any other person.' Surely to say that A shall be liable to B is the *express* creation of a right of action." *Id.*, at 822, 128 L. Ed. 2d 797, 114 S. Ct. 1960. But no Justice expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

In its original complaint, Aviall identified § 107 as the federal-law basis for an independent cost-recovery claim against Cooper, and § 113 as the basis for a contribution claim. App. 8A, 16A-17A. In amended pleadings, Aviall alleged both §§ 107 and 113 as the federal underpinning for

---

[11] Key Tronic, a PRP, asserted a cost-recovery claim under § 107(a) to recoup approximately $ 1.2 million in costs that it allegedly incurred cleaning up its site "at its own initiative." *Key Tronic Corp.* v. *United States*, 984 F.2d 1025, 1026 (CA9 1993). Although Key Tronic settled a portion of its liability with the Environmental Protection Agency (EPA), the claim advanced in Key Tronic's § 107(a) suit rested on remedial action taken before the EPA's involvement, remediation that did not figure in the settlement. *Id.*, at 1026-1027; *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 811-812, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994).

its contribution claim. *Id.*, at 27A, 48A. Aviall's use of §§ 113 and 107 in tandem to assert a contribution claim conformed its pleading to then-governing Fifth Circuit precedent, which held that a CERCLA contribution action arises through the joint operation of § 107(a) and § 113(f)(1). See *Geraghty and Miller, Inc.* v. *Conoco, Inc.*, 234 F.3d 917, 924 (2000) ("While section 113(f) is the vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107." (footnote omitted)). A party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea the party could have maintained had the law of the Circuit permitted him to do so. But cf. *ante*, at 9-10.

In the Fifth Circuit's view, § 107 supplied the right of action for Aviall's claim, and § 113(f)(1) prescribed the procedural framework. 312 F.3d 677, 683, and n. 10 (2002) (stating that § 107 " impliedly authorizes a cause of action for contribution" and § 113(f) "governs and regulates" the action (citing *Geraghty and Miller*, 234 F.3d at 924) (internal quotation marks omitted)); see § 113(f)(1) (calling for the governance of "Federal law" and the application of "the Federal Rules of Civil Procedure," and specifying that "in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Notably, Aviall expressly urged in the Court of Appeals that, were the court to conclude that § 113(f)(1)'s "during or following" language excluded application of that section to this case, Aviall's suit should be adjudicated independently under § 107(a). See Response of Appellant Aviall Services, Inc., to the *Amicus Curiae* Brief of the United States in No. 00-10197 (CA5), p. 24 ("Parties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery [covering

both full recovery and contribution] under section 107(a)."); cf. *Key Tronic*, 511 U.S., at 816, 128 L. Ed. 2d 797, 114 S. Ct. 1960 ("The statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.").

I see no cause for protracting this litigation by requiring the Fifth Circuit to revisit a determination it has essentially made already: Federal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could "recover [under § 107] a proportionate share of their costs in actions for contribution against other PRPs," 312 F.3d at 687;[12] nothing in § 113 retracts that right, *ibid.* (noting that § 113(f)'s saving clause preserves all preexisting state and federal rights of action for contribution, including the § 107 implied right this Court recognized in *Key Tronic*, 511 U.S.,

---

[12] The cases to which the Court refers, *ante*, at 12, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981), and *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981), do not address the implication of a right of action for contribution under CERCLA. *Texas Industries* concerned the Sherman and Clayton Acts, 451 U.S., at 639-646, 68 L. Ed. 2d 500, 101 S. Ct. 2061; *Northwest Airlines*, the Equal Pay Act and Title VII, 451 U.S., at 90-99, 67 L. Ed. 2d 750, 101 S. Ct. 1571. A determination suitable in one statutory context does not necessarily carry over to a different statutory setting.

at 816, 128 L. Ed. 2d 797, 114 S. Ct. 1960). Accordingly, I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a § 107 claim for relief against Cooper.

No. 00-10197

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AVIALL SERVICES, INC.,
Plaintiffs-Counter Defendant-Appellant,

vs.

COOPER INDUSTRIES, INC.,
Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
Northern District of Texas

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS

Appellant Aviall Services, Inc., asks this court to set a briefing schedule and allow the parties to file supplemental briefs on the issues that the Supreme Court has remanded to the *en banc* court. In support, Aviall states as follows:

1. In August 1997, Aviall filed this action against Cooper Industries, Inc., in the United States District Court for the Northern District of Texas, seeking to recover from Cooper a share of Aviall's environmental clean-up costs. Aviall asserted some state law claims but primarily sought recovery under section 107 and section 113 of the

federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607, 9613.

2. Both parties filed summary judgment motions. The district court granted Cooper's motion and denied Aviall's motion. Concluding that Aviall had dropped its section 107 claim when it filed an amended complaint, the court ruled solely on the propriety of Aviall's section 113 claim. The court read section 113 to allow an action for contribution only during or after a civil action under CERCLA. Because Aviall's clean up was not undertaken pursuant to a CERCLA suit, the court ruled that Aviall could not maintain its section 113 claim. The court then dismissed Aviall's section 113 claim and, choosing not to exercise supplemental jurisdiction over Aviall's state law claims, dismissed the entire case for lack of subject matter jurisdiction.

3. On appeal a divided panel of this court affirmed on substantially the same reasoning. 263 F.3d 134 (2001). On rehearing, this court sitting *en banc* reversed and held that Aviall could pursue its contribution action. 312 F.3d 677 (2002).

4. The Supreme Court granted Cooper's petition for writ of certiorari. On December 13, 2004, the Court reversed the *en banc* court and held that Aviall had no valid section 113 claim against Cooper. 543 U.S. ____, 125 S.Ct. 577 (2004) (Exhibit 1). Admitting uncertainty was to whether this court had ruled that Aviall had dropped its section 107 claim in the amended complaint, the Court declined to decide whether such a claim was still before the district court. It remanded that issue to this court.

5. Although Aviall mentioned this issue in its brief to the Supreme Court, *see* Brief of Respondent at 7 n.4, 36-38 (Exhibit 2), the Court noted that the parties had not

fully briefed the issue in this court. Because this specific matter is the subject of the Court's remand, the issue now requires full briefing in this court.

6. Aviall proposes the following briefing schedule and page limits:

Aviall's Brief (15 pages)	14 days after the ruling on this motion
Cooper's Brief (15 pages)	14 days after Aviall's brief is served
Aviall's Reply Brief (7 pages)	7 days after Cooper's brief is served

7. Aviall also requests that the court hear oral argument on this issue.

WHEREFORE Aviall respectfully requests that this court: (1) allow the parties to file supplemental briefs on the issue whether Aviall may pursue its section 107 claim, (2) adopt the proposed briefing schedule and page limits, and (3) hear oral argument on the section 107 issue.

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

/s/

Richard O. Faulk
Cynthia J. Bishop
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
(214) 999-3000
(214) 999-4667 (Fax)

ATTORNEYS FOR APPELLANT

No. 00-10197

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AVIALL SERVICES, INC.,

Plaintiff –Appellant

vs.

COOPER INDUSTRIES, INC.,

Defendant –Appellee

Appeal from the United States District Court
Northern District of Texas

RESPONSE BRIEF OF COOPER INDUSTRIES, INC. IN OPPOSITION TO AVIALL SERVICES, INC.'s MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS

Aviall Services, Inc. ("Aviall") requests that this Court take the extraordinary step of allowing direct "supplemental briefs on the issue [of] whether Aviall may pursue its section 107 claim." MOTION FOR LEAVE at ¶7. Such an approach would unnecessarily abrogate the customary judicial procedure of allowing the District Court to digest all evidentiary considerations, frame the factual

findings and determine the related legal issues presented, prior to any appellate review that might later be required. Accordingly, appellee Cooper Industries, Inc. ("Cooper") respectfully requests that this Court deny Aviall's request for immediate appellate briefing on the secondary § 107 issue, and instead remand this matter to the District Court for consideration and determination of the issues presented in the normal course.

First, the Supreme Court expressly distinguished the threshold, "preliminary waiver question" (*i.e.*, "the question whether Aviall has waived this claim"), from "the underlying § 107 question (***if*** it is not waived)...." *Cooper Industries, Inc. v. Aviall Services, Inc.*, ___ U.S. ___, 2004 U.S. LEXIS 8271 at *21-23 (2004) (emphasis added). Clearly, "the preliminary waiver question" must first be resolved ***before*** the secondary issue would even be ripe for consideration. *Id.* at *22. In other words, if Aviall is found to have waived a potential direct cost-recovery claim under CERCLA § 107 – through abandonment of that cause of action in its pleadings, failure to prosecute the claim, direct representations or admissions to the District Court, failure to appeal the District Court's previous determination regarding abandonment of the direct § 107 claim, etc.[13] – then this case is over.

---

13 Curiously, while Aviall admits in its current motion that the District Court "[c]onclud[ed] that Aviall had dropped its section 107 claim when it filed an amended complaint," MOTION FOR LEAVE at ¶2, Aviall's appeal to this Court was limited ***exclusively*** to the question of whether a "responsible party" can "recover its [alleged] cleanup costs from another responsible party ***under § 113 of CERCLA***." See BR. OF APPELLANT (May 19, 2000) at 2, emphasis added. Indeed, there is no mention whatsoever of CERCLA § 107, or the District Court's prior determination, in the "Statement of Issues" appealed by Aviall to this Court nearly five years ago. Under FED. R. APP. P. 28(a), "[t]he brief of the appellant must contain...[a] statement of the issues presented for review." See also *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1539 n. 14 (5th Cir. 1984) (granting motion to strike

Further, denial of Aviall's current motion is particularly warranted since the threshold waiver issue is inherently factual and must be remanded to the natural fact-finder (*i.e.*, the District Court) where the underlying actions were taken and representations made by counsel for Aviall. If further factual inquiry is necessary for "full consideration by the ***courts*** below," as directed by the Supreme Court (*id.*), that inquiry and factual determination must necessarily start with the fact-finding court.

I. PROCEDURAL BACKGROUND

Aviall filed this action seeking to recover environmental costs it incurred addressing contamination at four of its properties. Aviall initially asserted a direct "CERCLA Cost Recovery" claim under § 107(a), as well as a "CERCLA Contribution" claim under § 113(f)(1) and a multitude of pendant state-law causes of action. Aviall subsequently decided to amend its complaint, omitting the § 107 "CERCLA Cost Recovery" cause of action altogether. Both the District Court and a panel of this Court addressed Aviall's remaining § 113 contribution claim and ruled that it lacked the necessary legal prerequisites to survive. Sitting *en banc*, this Court reversed. However, the Supreme Court ultimately held that "Section 113(f)(1) does not authorize Aviall's suit" and remanded the case. *Id.* at *16.

---

portion of appellant's reply brief on the grounds that "an [appellant's] original brief abandons all points not mentioned therein") (internal citation omitted); accord *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 27 (5th Cir. 1992); *Stockman v. Federal Election Commission*, 138 F.3d 144 (1998).

II. AVIALL'S REQUEST CONTRADICTS THE SUPREME COURT'S INSTRUCTIONS

When this action was before the Supreme Court, Aviall only "mentioned"[14] the issue of whether it might have been entitled to directly "recover costs under CERCLA §107(a)(4)(B)." *Cooper*, 2004 U.S. LEXIS 8271 at *21. However, after rejecting Aviall's § 113 contribution claim, the Supreme Court expressly "declined to address" this contingent, un-briefed argument. *Id.* at *21. Instead, it determined that:

> ***Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's § 107 claim.*** Aviall included separate § 107 and § 113 claims in its original complaint, but then asserted a "combined" § 107/ § 113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on § 107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim." Consequently the court saw no need to address any freestanding § 107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a standalone § 107 claim. The en banc court found it unnecessary to decide whether Aviall had waived the § 107 claim, because it held that Aviall could rely

---

14 See MOTION FOR LEAVE at ¶5. Aviall has never suggested that it actually ***appealed*** this issue for consideration by the Court.

> instead on § 113. ***Thus, the court did not address the waiver issue, let alone the merits of the § 107 claim.***

Id. (emphasis added and internal citations omitted).

The nature of the Supreme Court's remand precludes Aviall's motion for direct briefing before this Court. The Supreme Court expressly stated that "[t]he §107 claim and the preliminary waiver question merit ***full consideration*** by the ***courts*** below." *Id.* (emphasis added). It also consistently noted that these issues would benefit from "briefing and ***decisions*** by the ***courts*** below...." *Id.* (emphasis added). The Supreme Court's consistent plural references to "courts" and "decisions" as well as its request for "full consideration" leave no doubt that it intended for normal processing before the District Court and then, if necessary, associated appellate review. To go along with Aviall's current request would impermissibly usurp the normal course of judicial proceedings clearly anticipated by the Supreme Court.

Indeed, the Supreme Court reached its decision under the basic precept that appellate courts "ordinarily do not decide in the first instance issues not decided below." *Id.* at *22 (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curium)). It then reasoned that the "exceptional circumstances" which occasionally warrant deviation from this principle were not present in this case, instead concluding that "the circumstances here cut *against* resolving the §107 claim." *Id.* (emphasis in original). These same over-arching principles apply with equal force to this Court. Aviall's instant motion requests preemptive appellate review of issues that the Supreme Court ruled "***[n]either the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc [have] considered....***" *Id.* at *21 (emphasis added). Based on the Supreme Court's own

analysis, immediate appellate briefing and review would be inappropriate. Rather, when a Supreme Court mandate is clear (as it is here) "it is the duty of the Circuit Court to carry it into execution...." *West v. Brashear*, 39 U.S. 51, 54 (1840).

III. AVIALL'S REQUEST WOULD PRECLUDE NECESSARY FACTUAL INQUIRY

The Supreme Court's chosen course of action is fully consistent with the factual nature of the issues to be determined. The first, and perhaps only, issue that will need to be addressed is whether Aviall has waived its right to further pursue a direct cost-recovery claim under CERCLA § 107. Waiver is an innately factual issue. See, *e.g.*, *United States v. Avants*, 278 F.3d 510, 519 (5th Cir. 2002) (whether or not a party has waived an argument in the district court is a question of fact); *Meeks v. Cabana*, 845 F.2d 1319, 1322-23 (5th Cir. 1988) (state court's finding of a waiver "involves a pure question of fact that is entitled to the presumption of correctness"); *First Interstate Bank of Ariz. v. Interfund Corp.*, 924 F.2d 588, 595 (5th Cir. 1991) (defense of waiver is a question of fact).

A detailed assessment of this factual issue may necessarily involve fact gathering, including discovery regarding the circumstances surrounding Aviall's change in position and testimony from each person involved. Ultimately, this inquiry may culminate in an evidentiary hearing centered upon facts not currently in the record. Following such an inquiry, Judge Fitzwater will be uniquely positioned to decide this factual issue based upon his historic personal interaction with counsel, the testimony and demeanor of other witnesses and the nature of the arguments made. In contrast, an appellate court lacks the fact-finding

apparatus necessary to conduct a fulsome review of the waiver issue.

As this Court has acknowledged, remand is the proper result where the parties have not had "a full and fair opportunity to develop facts relevant to the...decision." *Fruge v. Blood Services*, 506 F.2d 841, 844 (5th Cir. 1975). In this case, remand to the District Court in the first instance "is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Therefore, even if the rejection of Aviall's extraordinary motion for direct appellate review was not mandated by the Supreme Court's ruling, it would be required by the nature of the issues at hand.

IV. CONCLUSION

The Supreme Court's ruling that "[t]he §107 claim and the ***preliminary*** waiver question merit ***full consideration*** by the ***courts*** below" requires the rejection of Aviall's extraordinary request for direct appellate briefing. Further, denial of Aviall's motion is warranted because the threshold waiver issue requires the "full and fair" factual inquiry that this Court has recognized must precede appellate review. Accordingly, Cooper respectfully requests that this Court deny Aviall's MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS and instead remand this matter to the District Court for full consideration of: (1) whether Aviall has waived its right to assert a direct cost-recovery claim under CERCLA

§107; and, if necessary, (2) whether Aviall would be authorized by CERCLA to assert such a claim.

Respectfully submitted,

/s/
Dale E. Stephenson
Allen A. Kacenjar
SQUIRE, SANDERS &
DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

No. 00-10197

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AVIALL SERVICES, INC.,
Plaintiffs-Counter Defendant-Appellant,

vs.

COOPER INDUSTRIES, INC.,
Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
Northern District of Texas

REPLY BRIEF OF AVIALL SERVICES, INC. IN SUPPORT OF REQUEST FOR SUPPLEMENTAL BRIEFING

I. Summary of reply argument.

Cooper argues that the issues of whether Aviall waived its section 107 claim and whether Aviall even has a viable section 107 claim are properly decided by the district court, not this court. However, both parties previously briefed section 107 issues to some extent in their original briefing in this court, and so the viability of a section 107 claim is an issue properly before this court on appeal. In addition, the district court record before this court establishes

that Aviall did not waive the claim in that court. There is thus no need for a remand, whether for additional discovery or otherwise.

II. Both parties raised the section 107 issues in their original briefing, and so the matter is properly before this court.

Cooper questions whether Aviall properly raised a point of error regarding the district court's dismissal of Aviall's section 107 claim. However, the parties' previous briefs in this court raised that issue – albeit not as thoroughly as the Supreme Court's remand now requires – and so the section 107 issues are properly before this court.

Aviall raised both section 107 issues in its prior appellate briefing. *See* Response of Appellant to the Amicus Curiae Brief of the United States at 24 (arguing that "parties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery under section 107(a)"); Supplemental Brief of Appellant at 27 n.11 (arguing that "the district court stated that Aviall dropped its § 107 claim. Aviall's amended compliant states combined claims under § 107 and § 113 . . . should this court conclude that a PRP such as Aviall, who undertakes clean up pursuant to a state directive, has a cause of action under § 107(a)(4)(B) rather than § 113(f), the case should be remanded to the district court to continue the proceedings under § 107."). And Aviall requested reversal of the district court's dismissal as to all of Aviall's claims, not just as to the section 113 claim or the federal law claims. Supplemental Brief of Appellant at 30 ("Aviall . . . asks the court to reverse the district court's judgment as to all of Aviall's claims."). That the issue was not specified in the Statement of Issues is not fatal if the matter was briefed. *See, e.g., Allstate Ins. Co. v. Swann,* 27 F.3d 1539, 1542 (11th Cir.

1994); *Kincade v. General Tire & Rubber*, 635 F.2d 501, 504-505 (5th Cir. 1981).

Indeed, Cooper's briefs before the panel and before this court en banc all responded to the issues on the merits and did not question whether the issue had been properly raised in the appeal. *See* Response Brief of Appellee at 36 ("Either [Aviall] attempts to proceed under § 107 and the claim is dismissed under the prevailing law, or it drops the § 107 claim and lives with the consequences."); Supplemental Brief of Cooper Industries at 34-37 (arguing that Aviall voluntarily dismissed its section 107 claim that such a claim is not viable as a matter of law under the facts alleged).

Moreover, in its en banc opinion this court acknowledged that the parties had a continuing dispute over whether Aviall's pleadings properly seek contribution under section 107. *See* 312 F.3d 677, 685 n.15. The record of this appeal therefore shows that the section 107 issues were properly brought to this court on appeal.

III. The district court record establishes that Aviall did not waive the section 107 claim.

Contrary to Cooper's assertion, the present record is sufficient to show that Aviall did not waive its section 107 claim when it filed its first amended complaint – and so additional discovery would be superfluous and unnecessary. A determination of whether Aviall dropped its section 107 claim when it amended its complaint is a procedural question that should be decided as a matter of law. This issue can be decided by reviewing the record, including the first amended complaint and the transcript of the oral argument made during

the district court's summary judgment hearing.[15] The parties' summary judgment briefing assumed that the issue was properly before the court. *See* Plaintiff's Response to Defendant Cooper Industries, Inc.'s Motion for Summary Judgment at 11-12; Defendant Cooper Industries, Inc.'s Motion for Summary Judgment at 20-22. Even Cooper's answer to the first amended complaint raised an affirmative defense premised on the presence of a section 107 claim in that complaint. *See* Answer to First Amended Complaint and Counterclaim of Cooper Industries, Inc. at 15 (asserting that "Aviall is barred from pursuing a direct private-party claim against Cooper under the authority of CERCLA § 107(a)"). Cooper has not cited any specific discovery that is needed to clarify what these pleadings make clear – which indicates the issue is a red herring.

The district court held that Aviall had waived its section 107 claim. The panel opinion of this court agreed, but this court sitting en banc did not decide the issue. *See* 2001 WL 31730 at *2 (panel opinion), *superseded by* 263 F.3d 134, 137 n.2 (en banc). Consequently, there is no need for additional fact finding on this issue. Therefore, this issue should be decided by the en banc, not the district court.[16]

---

[15] *See* Transcript of Oral Argument Before the Honorable Sidney A. Fitzwater, United States District Judge at 25-27 ("MR. FAULK: I do believe that we were trying to seek the umbrella relief from - for - under both Sections of the provisions as they complemented each other.").

[16] While Cooper argues that the Supreme Court instructed the district court to resolve the § 107 Issues because it used the words "courts," "decisions," and "full consideration," it fails to note Justice Ginsberg's comment "I see no cause for protracting this litigation by requiring the *Fifth Circuit* to revisit a determination it has essentially already made [allowing § 107 actions to be brought by potentially responsible parties]." *Cooper*, 125 S.Ct. at 588. (emphasis added). This difference in syntax does not support Cooper's hyper technical argument.

WHEREFORE Aviall respectfully requests that this court: (1) grant Aviall's Motion for Leave to File Supplemental Briefs, (2) implement the scheduling order set forth therein, and (3) hear oral argument on the section 107 issues.

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

/s/

Richard O. Faulk
Cynthia J. Bishop
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
(214) 999-3000
(214) 999-4667 (Fax)

ATTORNEYS FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10197

AVIALL SERVICES, INC.,

Plaintiff-Counter-Defendant-Appellant,

vs.

COOPER INDUSTRIES, INC.,

Defendant-Counter-Claimant-Appellee.

ORDER

Before KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, GARZA, DEMOSS, BENAVIDES, STEWART, DENNIS, and PRADO, Circuit Judges.

BY THE COURT:

On remand from the Supreme Court, the en banc court has considered Aviall Services' Motion for Leave to File Supplemental Briefs and other relief, and having reviewed the supporting materials and opposition of Cooper Industries, Inc.,

It is **ORDERED** that:

(1) Aviall Services' motion for further decision by the en banc court is **DENIED**; and

(2) the case is **REMANDED** to the district court with instructions to permit Aviall Services to amend its complaint, if necessary, to assert, free of any challenge of waiver or forfeiture, whatever statutory claims it urges in light of the Supreme Court's decision, without prejudice to Cooper Industries' other defenses.

ENTERED FOR THE COURT:

/s/

EDITH H. JONES
UNITED STATES CIRCUIT JUDGE